No.

IN THE

Supreme Court of the United States

JAMES SHOBAR; CATHY HODGES; KELLY GORE; CONCERNED CITIZENS OF SANTA YNEZ VALLEY,
PETITIONERS,

v.

STATE OF CALIFORNIA; ARNOLD SCHWARZENEGGER, GOVERNOR OF CALIFORNIA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Indian Gaming Regulatory Act, 25 U.S.C. 2710 d empower the Governor of an affected State to negotiate terms of a tribal-state compact that violate the Constitutional rights of non-Indian workers in Indian casinos and businesses which rights are established by the State's Constitution?

Is the 10th Circuit's interpretation of title 25 section 2710 d (3) correct? That is, though federal law preempts the issue of the allowing gambling on Indian lands the tribal-state compact and all of the terms to be included in a compact by that section, and the compact itself, must be "lawfully in effect", meaning lawfully according to state laws?

Are Indian tribes necessary or indispensable parties to a lawsuit brought by non-Indian citizens against their government for Declaratory Relief to interpret their rights and the State's duties under a tribal-state compact and a mandate directed to the State to enforce the terms of a tribal-state compact which were included for their benefit and protection when no tribe can be joined because of sovereign immunity and, because of the interplay between joinder rules and common law "Indian immunity doctrines," Petitioners are left with no remedy at all under either State or federal law?

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On June 14th, 2005 the three judge panel assigned to this appeal entered it's unpublished memorandum opinion affirming the order of the District Court dismissing Petitioner's action without a trial or hearing on the merits. That decision is found at 1a in the Appendix hereto. The order of dismissal by the United States District Court, Central District of California the honorable Judge Manuel Real is found at 2a in the Appendix hereto.

JURISDICTION

The order affirming the dismissal was entered by the Ninth Circuit Court of Appeals on 6 July 2005. The time to seek this writ was extended when Petitioner sought Rehearing and Rehearing in Banc. The order denying Rehearing is at 3a in the Appendix hereto. This court's jurisdiction is invoked under 27 U.S.C. 1254.

RELEVANT PROVISIONS INVOLVED

10th AMENDMENT TO THE U.S. CONSTITUTION, AND THE 14th AMENDMENT TO THE U.S. CONSTITUTION, SEC. 1. TITLE 42 U.S.C. 1983 (See Appendix)

STATEMENT

This case began when the former Governor of California, Gray Davis, negotiated and executed 49 identical tribal-state compacts pursuant to the authority of the Indian Gaming Regulatory Act of 1988

[IGRA] 25 U.S.C. 2710 d. and the authority of the California Government Code amended by a public initiative commonly called Proposition 5 enacted in November 1998. Just prior to executing these compacts in October, 1999 the California Supreme Court struck down the initiative amendment to the Government Code in Hotel Employees and Restaurant Workers Union International v. Gray Davis [Cal. Supreme Court Aug. 1999] 21 Cal. 4th 585. That amendment to the California Government Code was struck down because it violated the California State Constitution Art. 4 Section 19 which prohibited Las Vegas style Casino gambling [called class III gaming under the IGRA]. Undaunted the Governor executed the compacts anyway and the Legislature approved them and they then placed a Legislative initiative on the ballot for March of 2000 entitled Proposition 1A. That proposition was intended to amend Article 4 section 19 of the California Constitution to authorize the Governor to negotiate tribal-state compacts with recognized Indian tribes to conduct some forms of casino style, or class III gaming on existing Indian reservations, primarily slot machines and house-banked card games, subject to ratification by the State Legislature. Proposition 1A was enacted in the March 2000 election and, in effect, retroactively validated the compacts executed earlier in October, 1999. Petitioners SHOBAR, GORE and HODGES were employed at the time by an Indian casino, Petitioners Hodges and Gore as dealers in the casino being operated by the Santa Ynez Band of Mission Indians, Petitioner Shobar worked in the Security Department. Petitioners Concerned Citizens of the Santa Ynez Valley were an unincorporated association of residents in the area negatively impacted by a number of "off-site" impacts

of the gambling casino and a large expansion of it in 2002.

Factual and Procedural History

Petitioners SHOBAR, HODGES and KELLY all sustained work-related injury or illness while on the job and which would be compensable under the Workers Compensation system established by the California Constitution Article 14 Section 4 and the California Labor Code. The 1999 tribal-state compacts executed in October 1999 provided that the compacting tribe could either participate in the State's Workers' Compensation system or adopt a comparable system complete with independent tribunals to hear and resolve any disputed claims of injured workers. The purpose of the Workers' Compensation (no fault) system is to eliminate tort litigation between workers and their employers. The Santa Ynez Band of Mission Indians did not participate in the State's Workers' Compensation system. When Petitioners made claims for their injuries, they were referred to an insurance adjuster employed by a wholly Indian-owned adjusting company called Tribal First. Their claims were all denied. When they indicated they wanted to appeal that denial, they were referred back to the tribal employer. They requested an appeal but received no response. When Petitioners reviewed the tribal-state compact they learned of the provision allowing the tribes to elect to adopt their own comparable system complete with a hearing before an "independent tribunal" but that election by the compacting tribe had to be made within 60 days of the effective date of the tribal-state compact and if the tribe elected not to participate in the State system, proof of a "comparable

system" had to be furnished to the Governor within that 60-day period.

Petitioners had legal counsel write to Governor Davis by certified mail to obtain the details of the "comparable system" furnished to the State. They received no response. They had their counsel contact the adjuster, Tribal First, and request the details of whatever the tribe's system was, however the adjuster refused to disclose any information claiming "sovereign immunity".

Petitioners then filed suit in the State Superior Court solely against Governor Davis and the State of California, seeking, among other things, declaratory relief to determine what comparable system the tribe, or any tribe had adopted and whether or not the Governor or the State had any lawful authority to enter into that Workers' Compensation provision of the tribal-state compact in light of Article 14 section 4 of the California State Constitution and they sought a further determination of whether the compact was lawfully in effect given the provisions of the California Constitution which established a mandatory system for resolving the disputed claims of all injured workers in California and ultimately subjected such determination to the exclusive review of the Courts of Appeal of the State of California. When hired, Petitioner workers never waived any rights provided to workers by law. When served with Petitioner's complaint, the Governor and the State removed the case to the United States District Court before there were any State court actions and then immediately moved to dismiss Petitioner's case on the grounds that they had failed to join an indispensable or necessary party in their suit

against the Governor, namely the Indian tribe(s) and the State successfully argued Indian tribes could not be joined as a matter of law because of the common law doctrine of sovereign immunity. Petitioners simultaneously moved to remand the matter back to state court for lack of any federal question but the Court never ruled on that motion. Instead, the District Court, Judge Manuel Real presiding, dismissed Petitioner's action with prejudice on the grounds that Petitioners had failed to join a necessary or indispensable party and that they had no standing to bring a lawsuit "based upon the IGRA or the tribal-state compact." That the tribe(s) could not be joined because of sovereign immunity and, Petitioners had no standing to sue under the IGRA (although Petitioners never sued under the IGRA). Without any legal recourse to redress their injury and this denial of due process, they appealed the dismissal to the Ninth Circuit Court of Appeals who ultimately affirmed the dismissal in an unpublished memorandum decision [Appendix 1a] and then denied Petitioner's Petition for Rehearing and Rehearing En Banc.

REASONS FOR GRANTING THIS PETITION

The 10th Amendment to the United States Constitution provides that "powers not delegated to the United States **by the Constitution**, nor prohibited by it to the states, are reserved to the states respectively, **or the people**." The 14th Amendment in relevant part provides "...nor shall any state deprive any person of life, liberty, or property without due process of law; **nor deny to any person within its jurisdiction the equal protection of the laws**. Similarly title 42 U.S.C. 1983 prohibits the deprivation of civil rights by

any government or agent for a government acting under color of authority. [Emphasis added.]

Petitioners SHOBAR, HODGES and GORE were citizens of California and of the United States and as workers were and are entitled to all of the protections accorded all workers within the State of California. Congress has recognized that the area of workers compensation is within the power and control of the States under 28 U.S.C. 1445. Under the provisions of Art. 14 section 4 of the California Constitution, Petitioners are entitled to a specified due process of law to resolve their disputed claims of work injuries. Acting first under color of state law (previously declared unconstitutional) and the authority of the IGRA, 25 U.S.C. 2710 d (3)-(5) the State of California purported to give away Petitioners Workers' Compensation rights in the terms of a tribal-state class III gambling compact. Petitioners assert here neither the Governor nor the State had the authority to bargain away or waive their Constitutional rights under the authority of the IGRA in order to enter tribal-state gaming compacts.

Petitioner Concerned Citizens of Santa Ynez Valley joined in Petitioners' State Court action to determine what was meant in the compact terms and conditions, which were apparently intended to protect adjacent or nearby non-Indian communities from the negative off-site impacts of large Indian casino gambling enterprises and related businesses and the many problems they create. That section of the tribal-state compact provided that the compacting gambling tribes would "make a good faith effort to adopt the National Environmental Policy Act [NEPA] and the California Environmental Quality Act [CEQA]. It also

provided the tribes would "make a good faith effort to mitigate all negative off-site impacts" of the casinos and businesses. Petitioners Concerned Citizens of the Santa Ynez Valley alleged the tribe made no efforts at all to do these things and it appeared that the State and the Governor had not made any effort to enforce those provisions of the compact. The compact provided that any tribe who did not comply with any compact provision would be notified in writing and if it was a violation and it continued without abatement, correction or mitigation the State could take action against the tribe, even ultimately to terminate the compact in a federal lawsuit brought by the State against the offending tribe or tribes.

Also, as asserted below, the issues raised in their underlying suit against their Governor and the State, involved no federal question and was between them and their government to both clarify terms of the tribal-state compact for their benefit and, where appropriate, for the State to take actions on their behalf ex relator, to enforce the terms of the tribal-state compact affecting Petitioner's constitutional rights and statutory rights.

CONFLICTS AND CONFUSION EXISTING IN THE LOWER COURTS AS TO BOTH THE MEANING OF *25 U.S.C. 2710 d (3) AND THE EXTENT TO* WHICH THE SOVEREIGN IMMUNITY OF INDIAN TRIBES CAN COMPLETELY OVERCOME THE RIGHTS OF NON-INDIAN CITIZENS WHO ARE THE PATRONS AND WORKERS IN THESE CASINOS AND THE NON-INDIAN COMMUNITIES IN WHICH THESE INDIAN CASINOS AND BUSINESSES ARE SITUATED

This court recognized in its decision in *Kiowa Tribe of Oklahoma versus Manufacturing Technologies, Inc.* [U.S.S.C. 1998] 523 U.S. 751, 118 S.Ct. 1700 that the court created doctrine of "tribal sovereign immunity" had little utility left in this day and age where Indian tribes and their holding companies own and operate huge profitable businesses like casinos, shopping centers, marinas, hotels, restaurants, amusement parks and ski resorts, etc. These businesses not only rely upon non-Indian public patrons but also employ largely non-Indian workers. In deference to the tradition of *stare decisis* however this court was reticent to eliminate the doctrine altogether and instead put the onus on Congress to correct the problem, suggesting by way of *dicta*, that they could amend the Foreign Commerce Act to level the playing field for Indian tribes doing business with public and hiring largely non-Indian employees. The tribes would thereby retain sovereignty except in the operation of these businesses the same as any foreign sovereign nation who chose to do business in this country but would become subject to all federal, State and local laws, pay the same taxes and be subject to suit for their misdeeds like any other business. Congress has done

nothing to correct this growing problem in the intervening seven years since the Kiowa decision. A recent decision of the National Labor Relations Board reached the same conclusions as the Kiowa court and for the same reasons, as those principals would be applied to the organizational rights of workers and unfair labor practices regulated by the National Labor Relations Act.

The 10th Circuit held in *Pueblo of Santa Ana v. Kelly* [10th Cir. 1997] 104 F.3d 1546 that the phrase in 25 U.S.C. 2710 d (3) "lawfully in effect" meant that in addition to those other applicable requirements under 25 U.S.C. 2710 d and the Code of Federal Regulations, the tribal-state compact must be lawfully in effect as determined by State Law. See also *Jicarilla Apache Tribe v. Kelly* [10th Circ. 1997] 129 F.3d 535. In the present case the aggrieved terms of the tribal state compact are violative of the California State Constitution protecting workers rights all tort law protections for injured or cheated patrons, as well as a host of environmental laws enacted for the health and welfare of everyone in the community, and the quality of life for everyone including Indians. The State's failure or refusal to require the tribes participation in the state Workers' Compensation system or to require the establishment of comparable systems with independent tribunals, notice, hearing and other facets of minimum due process, is a denial of Petitioner's Constitutional rights to due process of law. Neither the IGRA nor the doctrine of sovereign immunity should serve as a vehicle to deny the citizens of the United States and of each of the several states the due processes of law to which they are equally entitled. In *Krystal Energy Co. v. Navajo Nation* [9th Circ. 2004]

357 U.S. 1055 the Ninth Circuit analogized Indian tribal government to municipal governments at least for purposes of the Bankruptcy Act. This makes sense because the federal, State and local governments have limited and not total immunity from lawsuit. There is an immediate and pressing need to clarify to what extent "sovereign immunity" can be used to suppress the rights of non-Indian citizens. To use the words of Justice Stevens in his dissent in the Kiowa case, "Why should an Indian tribe have greater immunity than the United States, all the States and all foreign sovereign nations?"

The Indian gambling business has become a 20 billion dollar a year business in just a few years with tribes buying up land and opening up more and more casinos and other businesses. Because of "sovereign immunity" these businesses, including many far from reservation lands, can unfairly compete with non-Indian businesses who must obey the tort laws, the environmental protection and zoning laws, as well as laws that protect workers from injury, discrimination and harassment, and tax laws which require payment of all the taxes needed by State and local governments who provide the public services used by these Indian businesses and provide and maintain all of the infrastructure used by Indian tribes, and their casinos and businesses.

JOINDER OF INDIAN TRIBES IN ANY NON-FEDERAL STATE COURT ACTION BETWEEN STATE CITIZENS AND THEIR GOVERNMENT

The court below, relying on *American Greyhound v. Hull* [9th Circ. 2002] 305 F.3d 1015,

concluded that the Santa Ynez Band of Mission Indians were necessary or indispensable parties even though the State conceded in their briefs that a determination of the constitutionality of the Workers' Compensation clause used in the compact could be resolved without the participation of any tribe just as the issue of casino gambling was resolved in *Hotel Employees and Restaurant Workers Union Internat.* [Cal. Sup. Ct. 1999] 21 Cal. 4th 585. That was accomplished without the mandatory participation of any of the Indian gaming tribes. No Indian tribe is a necessary or indispensable party to a lawsuit between the state and its citizens seeking declaratory relief about somewhat vague terms of a tribal-state compact and the need for enforcement by the state of the provisions in such a compact for the very reason that Petitioners themselves had no right of direct action against the tribe because of "sovereign immunity" and could only compel the State to do it's duty on their behalf.

Even if the Santa Ynez tribe or all tribes were necessary or indispensable parties they could have been joined in Petitioner's action or had the right to join or intervene voluntarily to protect any interest they might have in the outcome.

Finally where a lawsuit raises important issues of declaratory relief and widespread important questions of law, then exceptions exist to the normal joinder rules. *See Makah Indian Tribe v. Verity* [9th Circ. 1990] 910 F.2d 555 and *Shermoen v. United States* [9th Circ. 1992] 982 F.2d 1312. This is said to be a balancing of the compulsory joinder rules with the harm or lack thereof if such a party were not joined,

particularly where dismissal leaves a party with no legal redress at all.

In any case, even if the Santa Ynez Band of Mission Indians were deemed to be a necessary party to the State Court action [removed to federal court when no federal question was raised] the important public issue exception should have been applied. Those public issue exception cases held that where a marginally necessary or procedurally indispensable party to an action exists in a case in which widespread public interest and necessity are involved then those parties either need not be involved or can be nominally joined to resolve the issues raised in the case. There are over 40,000 workers in California in Indian casinos and businesses. The vast majority are non-Indians and in accepting employment do not and did not waive their State and federal Constitutional rights either actually or implicitly. In Petitioner's state court case, they sued their Governor on the grounds that he, acting for the State, executed a compact which gave the option to Indian casino tribes to participate in the State court Workers' Compensation system or to provide a comparable system which included notice, and hearing before independent tribunals to resolve any disputed injury claims. The tribe involved here (and most if not all other 48 tribes) provided neither.

In the State court action Petitioner's asserted first that the Governor did not have the authority to negotiate away rights created by the State Constitution without an amendment to the Article 14 section 4 of the State Constitution. Proposition 1A, which amended Article 4 section 19 in March 2000 to allow the Governor to negotiate a tribal-state compact with Indian tribes to conduct certain classes of class III casino gambling pursuant to 25 U.S.C. 2710 d (3), did not amend Article 14 section 4 at all. Under California's "one subject per

initiative rule" that could not have been lawfully done. The State's Constitution requires any and all lower decision concerning a disputed claim of injury covered by Workers' Compensation be reviewed or reviewable by the Appellate Courts of the State of California. In the alternative Petitioners alleged below, that if it were lawful for the Governor to have entered into a tribal-state compact to permit Indian tribes to adopt a "comparable system" as set out in the compact, then the Governor had a duty to verify that such a system was adopted in the 60 days provided and that the tribes system in fact had an independent impartial hearing procedure as the compact required. Because the Governor and the State did not do so, Petitioners had a well-established State court right to declaratory relief and a writ of mandate to compel the Governor to do his duty. This is entirely a state court issue for which no Indian tribe is either a necessary or indispensable party. Quite obviously the tribe had no right nor any reasonable expectation that terms they had agreed to in the tribal-state compact for the benefit of non-Indian California citizens would or could be simply ignored. The Ninth Circuit Court of Appeals decision in *American Greyhound versus Hull*, 305 F. 3d 1015 *supra*, relied upon by the Ninth Circuit below in this case, was not only distinguishable on its facts, but inapplicable on the legal issues involved here. That issue is whether the tribal-state compact was lawfully in effect as required by state law as enunciated in *Pueblo of Santa Clara versus Kelly*, 104 F.3d 1546 *supra*, and, if it was lawfully in effect, then the State had an affirmative duty to enforce that compact and when it failed or neglected to do so, the citizens of the State have the right to compel that performance by judicial mandate. As set out below, given the fact that

Indian tribes still have a largely ambiguous and poorly defined "sovereign immunity" from suit, Petitioners could not sue the tribe and under the facts of this case, need not have sued them. In addition, contrary to rulings made below in reliance on the case of *Hein v. Capitan Grande Band of Diegueno* [9th Circ. 2000] 201 F.3d 1256, 1260, Petitioners state court action for declaratory relief and mandate was not brought based upon the IGRA 2710 d or any other section therein but rather was brought under well-established State laws and procedures to clarify whether the Governor had violated the State's Constitution protecting all state workers by agreeing to the offending compact provisions. If not then the Governor and State had an affirmative duty to all its workers to carry out the provision in the negotiated compact that required all compacting tribes not participating in the State system, to provide a verifiable adequate alternative system within 60 days. Once again this was and is a purely State court issue, of great importance, between the citizens and workers of California and its government.

CONCLUSION

For the reasons hereinbefore set out, the writ should be granted and these important issues resolved, not only for these petitioners but also many thousands of other workers in California and other states in which the question arises as to what authority the State's Governor and/or Legislature has in negotiating a tribal-state compact under 25 U.S.C. 2710 d and what the meaning of the phrase in section 2710 d (3) "lawfully in effect" means. Petitioners argue that the correct interpretation is that placed on the phrase by the 10th Circuit in *Pueblo of Santa Ana versus Kelly supra.*,

that it means lawfully in effect according to state law. This is true because even if title 25 section 2703 *et.seq.* [IGRA] pre-empts state law on the issue of authorizing-gambling on Indian reservations it does not render all State laws inapplicable to these Indian casinos and businesses. Under the laws of most states, a contract incorporates in its terms all of the existing laws in effect without necessarily setting them out in the terms of the written contract [or compact]. Allowing "sovereign immunity" and/or the IGRA section 25 U.S.C. 2710 d (3)-(5) to form a legal basis to evade all state laws relating to the health, safety and welfare of a State's citizens and the quality of life for everyone, would clearly violate at least the 10th Amendment and 14th Amendment to the United States Constitution.

Dated: November 30, 2005

Respectfully submitted,
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(any footnotes trail end of each document)

No. 03-56995

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES SHOBAR; CATHY HODGES; KELLY GORE; CONCERNED CITIZENS OF SANTA YNEZ VALLEY,
Plaintiffs-Appellants

v.

STATE OF CALIFORNIA; ARNOLD SCHWARZENEGER, Governor of California,
Defendants-Appellees

June 7, 2005, Argued and Submitted, Pasadena, California

June 14, 2005, Filed

NOTICE: RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

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JUDGES: Before: TROTT, W. FLETCHER, Circuit Judges, and RESTANI,*Judge

OPINION: MEMORANDUM **

James Shobar, Cathy Hodges, Kelly Gore, and Concerned Citizens of Santa Ynez Valley appeal from the district court's order dismissing their case for failure to state a claim and failure to join an indispensable party. Because appellants' claims raise questions of federal law under the Indian Gaming Regulatory Act (IGRA), we reject appellants' argument that the district court lacked federal question jurisdiction. We hold that the district court correctly dismissed appellants' claim because no private cause of action exists to enforce the state-tribal compact under either IGRA or the terms of the compact itself. *See* Hein v. Capitan Grande Band of Diegueno Mission Indians, 201 F.3d 1256, 1260 (9th Cir. 2000)(finding no general private right of action to enforce IGRA); 1999

Tribal-State Class III Gaming Compact § 15.1 (providing [*3] that compact "shall not be construed to ... create any right on the part of a third party to bring an action to enforce any of its terms"). Even if appellants could state a claim, the suit could not proceed because the Santa Ynez Band of Mission Indians is an indispensable party under Fed. R. Civ. P. 19, and tribal sovereign immunity precludes the Band's joinder. See American Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1022 (9th Cir. 2002).

AFFIRMED.

Footnotes

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

CV03-4530 R (CWx)

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JAMES SHOBAR, et al.,
Plaintiffs,

v.

THE STATE OF CALIFORNIA, et al.,
Defendants.

AMENDED ORDER OF DISMISSAL WITH PREJUDICE

10/7/03

On September 22, 2003, the motion of the defendants State of California and Governor Gray Davis to dismiss this action pursuant to Federal Rules of Civil Procedure, Rules 12 (b) (6), 12 (b) (7), and 19, came on the Court's calendar for hearing. The plaintiffs were represented by James E. Marino; the defendants were represented by Marc. A. Le Forestier, of the California Attorney General's office.

The Court, having considered the papers filed and arguments submitted in support and in opposition to this motion, and being fully advised and finding good cause therefore, hereby makes the following order:

The Court lacks jurisdiction over the Indian tribes of

California, which are indispensable parties to this action and which tribes may not be joined as party defendants because they are immune to civil suit. Moreover, the plaintiffs lack standing under the Indian Gaming Regulatory Act to bring the subject action. For these reasons, the defendants' motion to dismiss the complaint is GRANTED, and the action is dismissed with prejudice.

It is so ordered.

Judge of the US District Court
for the Central District of California

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 42 > CHAPTER 21 > SUBCHAPTER I > § 1983

§ 1983. Civil action for deprivation of rights

Release date: 2005-02-25

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a

declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

No. 03-56995
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES SHOBAR; CATHY HODGES; KELLY GORE; CONCERNED CITIZENS OF SANTA YNEZ VALLEY,
Plaintiffs-Appellants

v.

STATE OF CALIFORNIA; GRAY DAVIS, Governor of California,
Defendants-Appellees

9/1/2005

Before: TROTT and W. FLETCHER, Circuit Judges, and RESTANI,*

Judge The panel has voted to deny the petition for rehearing. Judge Fletcher has voted to deny the petition for rehearing en banc; and Judges Trott and Restani so recommend.

The full court has been advised of the petition for rehearing en bane and no judge of the court has requested a vote on whether to rehear the matter en banc Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en bane, filed August 4, 2005, are DENIED.

*The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

No. 05-707

IN THE

Supreme Court of the United States

JAMES SHOBAR; CATHY HODGES; KELLY GORE; CONCERNED CITIZENS OF SANTA YNEZ VALLEY,
PETITIONERS,

v.

STATE OF CALIFORNIA; ARNOLD SCHWARZENEGGER, GOVERNOR OF CALIFORNIA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

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CASES

OTHER AUTHORITIES

STATEMENT

The facts and procedural history of this case are set out in Petitioners original Petition for Writ of Certiorari, the denial of which is the subject of this Petition for Rehearing.

REASONS FOR GRANTING REHEARING

Petitioners request rehearing of the denial of their petition for Writ of Certiorari pursuant to Rule 44. This request is made because in the original petition, Petitioners focused on the substantive issues and for the sake of brevity did not fully argue the procedural denial of due process in their case. These issues are important enough in their own right to warrant reconsideration.

DISCUSSION

The facts of this case and procedural history are set out in Petitioners original petition for Writ of Certiorari. In that original petition, Petitioner's focused on the substantive question of the complete conflict between their rights as citizens and California workers in relation to their state government and the powers of the governor under the Indian Gaming and Regulatory Act of 1988. [25 U.S.C. 2701 *et.seq.*]. In addition they focused on the impact of the court created doctrine of tribal "sovereign immunity" and whether that common law doctrine coupled with the IGRA could operate to eliminate their California Constitutional right to Workers Compensation protections. Citing this court's decision in *Kiowa Tribe*

of Oklahoma v. Manufacturing Technologies, Inc. [1998] 523 U.S. 751, 198 S.Ct. 1700, Petitioners argued that the vitality of this doctrine of legal immunity in the modern workplace was at the least suspect and conflicted with their substantive Constitutional rights and in addition the State had agreed to a suspect "alternative system" in tribal-state compacts and they were not even enforcing that suspect system. Although the right to Workers Compensation protection may not rise to the level of a "fundamental right" it is certainly recognized as a basic right of importance as discussed by this court in *Bodie v. Connecticut* [1971] 401 U.S. 3711, 91 S.Ct. 780 which decision was based on State divorce laws. Moreover under California law it is a State Constitutional right to have this protection and an impartial method of resolving disputes. See *California Constitution*, Art. 14, section 4. It seemed clear to petitioners that this court recognized that the common law doctrine of Indian tribal or Indian "sovereign immunity" was at least an anachronism in this day and age. As the majority put it:

> "Though the doctrine of tribal immunity is settled law and controls this case, we note that it developed almost by accident. The doctrine is said by some of our own opinions to rest on the Court's opinion in *Turner v. United States*, 248 US 354, 63 L Ed 291, 39 S Ct 109 (1919). See, e.g., *Potawatomi, supra*, at 510, 112 L Ed 2d 1112, 111 S Ct 905. Though *Turner* is indeed cited as authority for the immunity, examination shows it simply does not stand for that proposition...."

> "The quoted language is the heart of Turner. It is, at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine. One cannot even say the Court or Congress assumed the congressional enactment was needed to overcome tribal immunity." [Citations omitted]...."
>
> "[1b] These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role of Congress may wish to exercise in this important judgment."

In *Brown v. Board of Education* [1954] 347 U.S. 483, 41 L.Ed. 256 this court had little difficulty in disposing of the outdated concept in the State of Louisiana and other places promptly disposing of the notion that segregated schools were acceptable under the rule of *Plessy v. Ferguson* [1896] 163 U.S. 537, 74 S.Ct. 686, that is "separate but equal" was acceptable. In concluding separate was not equal, this court had no trouble disposing of the principal of "*stare decisis*" saying that the precedent was outdated and inappropriate in modern times.

In the more recent case of *Seminole Tribe of Florida v. Florida* [1996] 116 S.Ct. 1114 this court defined the policy of "*stare decisis*" as not being an impediment to the correction of badly reasoned policies and decisions putting the issue this way:

"[8] Respondents argue, however, that we need not conclude that the Indian Commerce Clause grants the power to abrogate the States' sovereign immunity. Instead, they contend that if we find the rationale of the *Union Gas* plurality to extend to the Indian Commerce Clause, then "*Union Gas* should be reconsidered and overruled." Brief for Respondents 25. Generally, the principle of *stare decisis*, and the interests that it serves, viz., "the evenhanded, predictable, and consistent development of legal principles, ... reliance on judicial decisions, and ... the actual and perceived integrity of the judicial process," *Payne v. Tennessee*, 501 US 808, 827, 115 L Ed 2d 720, 111 S Ct 2597 (1991), counsel strongly against reconsideration of our precedent. Nevertheless, we always have treated *stare decisis* as a "principle of policy," *Helvering v Hallock*, 309 US 106, 119, 84 L Ed 604, 60 S Ct 444, 125 ALR 1368 (1940), and not as an "inexorable command," *Payne*, 501 US, at 828, 115 L Ed 2d 720, 111 S Ct 2597. "[W]hen governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent.'" *Id.*, at 827, 115 L Ed 2d 720, 111 S Ct 2597 (quoting *Smith v. Allwright*, 321 US 649, 665, 88 L Ed 987, 64 S Ct 757, 151 ALR 1110 (1944)). Our willingness to reconsider our earlier decisions has been "particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" *Payne*, *supra*, at 828, 115 L Ed 2d 720, 111 S Ct 2597 (quoting *Burnet v Coronado Oil & Gas Co.*, 285 US 393, 407, 76 L

Ed 815, 52 S Ct 443 (1932) (Brandeis, J., dissenting))."

Because this court gave Congress the plain hint to correct the federal judicial morass of outdated case law in its decision in the Kiowa case *supra* and Congress failed to take the hint, Petitioners argued that their certiorari petition presented the opportunity for this court to rectify its own creation which evolved in this court's own words, "almost by accident." This court recognized a doctrine evolved through a series of somewhat ambiguous decisions which talk about a form of limited sovereign immunity which, quite frankly, seems to defy any rational definition.

Petitioners therefore neglected to focus their original petition for Certiorari on issues of procedural due process which present equally unjust results.

Perhaps the plight of three lowly workers in a tiny community in California did not seem to present a case startling enough to gather the attention of the court, even though their dilemma is akin to that of tens of thousands of workers, patrons, communities and non-Indian citizens occurring and recurring on a daily basis all over California and the several states. The common law doctrine of immunity from the laws of the land as applied to widespread dealing between Indian tribes and the citizens of the several states result in numerous conflicts between tribes and non-Indian employees, customers and surrounding communities. Now that Indian gaming alone has become a 19 billion dollar a year enterprise and Indian businesses are so prolific, it appeared to Petitioners that this court cannot continue to overlook it and obviously cannot rely upon Congress to right the listing ship of the federal judiciary.

In any case, in this Petition for rehearing these petitioners now request that the court look more closely at these important issues and at least hear their plea regarding the complete lack of procedural due process that was denied them by the use and abuse of rules of joinder, combined with "Indian sovereign immunity" and claims that "federal question" jurisdiction existed when it didn't. This legal shuffle was utilized by the State of California to deny petitioners their due process of state law in violation of the 14th Amendment. Petitioners had sued their own governor-under well-recognized principals of State law when the government either engages in *ultra vires* acts or fails to do a duty owed to its citizens.

As set out in *Pueblo of Santa Ana v. Kelly* [10th Circ. 1997] 104 F.3d 1546 the Indian Gaming and Regulatory Act of 1988, 25 U.S.C. 2701 et.seq. did not provide the governor with any authority to violate the New Mexico State Constitution in negotiating a tribal-state compact under 25 U.S.C. 2710d. See also *Calumet Gaming Group-Kansas v. Kickapoo Tribe* [D. Kansas 1997] 987 F.Supp. 1321.

Petitioners filed a state court action merely for declaratory relief to determine if their governor had acted *ultra vires* and if not then they sought a declaration that he was required to enforce the terms of the tribal-state compact he had negotiated and in which the State and Indian tribes had inserted into contract terms and conditions for the benefit and protection of Petitioners. It seemed obvious that no Indian tribe had either standing or any right to object to the enforcement by the State of terms in a contract they willingly signed in order to capitalize on exclusive casino and gambling rights.

When Petitioners filed their state action the State set out to deny Petitioners their right to pursue any action against the State and the governor by first petitioning to remove the case to federal court when no federal question was involved. Then after removal, making a motion to dismiss Petitioners state court action on the grounds they failed to join any Indian tribe and argued the case must then also be dismissed outright because Petitioners couldn't join any Indian tribe in their suit in any case because of the common law doctrine of tribal sovereign immunity. The federal district court then dismissed Petitioners case without even complying with findings required by the Federal Rules of Civil Procedure, which findings and conclusions are required when a court summarily dismisses an action with prejudice as it did in this case. Petitioners unsuccessfully sought relief from the 9th Circuit who turned a deaf ear to their plight. The author, Joseph Heller, writing about flight missions in World War II, coined the phrase "Catch 22" which has come to be understood as a form of purgatory from which one cannot escape. In Petitioners case, California's use of removal, tribal sovereign immunity and dismissal for failure to join "unjoinable parties" constituted a denial of procedural due process of law in violation of the 14th Amendment to the United States Constitution. It placed Petitioners in legal purgatory where a federal court decided their state court action, not on the merits, but by using a bogus "federal question" and the common law Indian sovereign-immunity doctrine as a sword to silence them and dispose of their case without ever deciding a single substantive issue on its merits.

When confronted with a direct conflict between the technical rules of joinder and Indian "sovereign

immunity" in another case the 9th circuit found a simple method to rationalize both in order to avoid denying the Petitioners in that case their due process of law. See the discussion and result in *E.E.O.C. v. Peabody Coal Co.* [9th Circ. 2005] ____ F 3d _____.

PRAYER

This court has seen the fallacy in perpetuating a court made doctrine of legal immunity for Indian tribal businesses that flies in the face of a host of laws that protect customers workers and surrounding communities. It invited Congress to fix these problems created "almost by accident". That was in 1998 and they have not done so despite the burgeoning problem.

This court declined to take Petitioners case on their original petition for certiorari which was based primarily on Petitioners writ alleging a denial of substantive due process rights. Petitioners did not emphasize the denial of procedural due process resulting from the procedural manipulations of the State of California. On re-hearing this court should at the least consider the denial of the procedural due process denying Petitioners any forum from which to have their case heard on the merits and the questions raised by their original State court action seeking only declaratory relief against their own State government.

Petitioners, therefore, seek reconsideration of the narrower question of the denial of their procedural due process rights and denial of their right of access to the courts of the State of California which due process was denied them because of the procedures utilized by the State of California in violation of the 14th Amendment to the United States Constitution. The federal courts should not have aided and abetted in this

effort when the questions presented in State court were clearly questions of State law, [*Pueblo of Santa Ana v. Kelly* 104 F.3d 1546 *supra*] and there were and are simple means to avoid the "Catch 22" legal purgatory created by the conflict between joinder rules and Indian sovereignty. See *E.E.O.C. v. Peabody Coal Co. supra.* ___ F.3d ____ supra.

Dated: February 17, 2006

Respectfully submitted,

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CERTIFICATION OF GOOD FAITH PETITION FOR REHEARING

I, Brenton Horner declare under penalty of perjury that this Petition for Rehearing is made in good faith and is not filed for any purposes of delay. Executed this 17th day of February 2006 at Santa Barbara, California.

Dated: February 17, 2006

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